IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. RICHARDSON

STATE OF NEBRASKA, APPELLEE,
V.
BRYAN VAN RICHARDSON, JR., APPELLANT.

Filed October 2, 2012. No. A-11-921.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Jerry Fogarty for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Bryan Van Richardson, Jr., appeals from his conviction in the district court for Hall County following a jury trial for distribution of a controlled substance, cocaine. On appeal, he assigns error to the admission of evidence concerning the weight of the cocaine and to the court's failure to give instructions on entrapment and the lesser-included offense of possession of a controlled substance. Because we find no error in the admission of evidence or in the denial of Richardson's requested instructions, we affirm.

BACKGROUND

The State filed an information in the district court on March 21, 2011, charging Richardson with two counts of possession of a controlled substance, cocaine, with intent to distribute in violation of Neb. Rev. Stat. § 28-416 (Reissue 2008). The State alleged that the quantity of cocaine involved in the second count was between 10 and 28 grams. The first count was dismissed prior to trial, and Richardson was tried on only the second count.

A jury trial was held on June 27 through 29, 2011.

The evidence at trial established that in December 2009, Craig Redinger agreed to assist the Tri-City Drug Task Force with a series of controlled drug purchases, in exchange for the dismissal of a burglary charge that was pending against him in Hall County. Redinger met with Nebraska State Patrol Investigator Ross Lyon, and they identified Richardson as a potential seller for a controlled purchase. Redinger called Richardson and set up a buy for December 17, 2009, and then called Lyon to let him know that the purchase had been arranged. The plan was for Redinger to go to Richardson's house in Grand Island, Nebraska, and purchase half an ounce of cocaine.

On December 17, 2009, Lyon and another Nebraska State Patrol drug investigator, Steven Kolb, met with Redinger to prepare the controlled purchase. The investigators searched Redinger, as well as his vehicle, to ensure that he did not have contraband in his possession when he went to Richardson's house to make the purchase. The investigators then gave Redinger $500 in cash for the purchase and hid a wireless transmitter on him, so they could record any conversations that occurred during the purchase. The investigators followed Redinger to Richardson's house and, along with several other members of the task force, set up a surveillance perimeter around Richardson's house.

Redinger went into Richardson's house, and the surveillance team recorded his conversation while he was inside. The conversation, which was admitted by stipulation, shows that a male individual asked for "a half" and told a second male individual that he had "500 for you now" but that if that individual fronted him for a week he knew "some people that want it." The audio recording further shows that the second male offered the first male "three balls" and that the first male asked the second male if he had a "digi" and referred to what he was seeing as "fish scale." The audio recording also shows that the second male said the price for three was "275" for a total of "825," that the first male paid "five" then and offered the rest within a week, and that this was the last of the second male's product but that he would get some more when he talked to "[his] people." Redinger testified that the voices on the recording were his and Richardson's and that the recording accurately portrayed the events that took place during the controlled buy in Richardson's house on December 17, 2009.

Redinger testified that he originally planned to buy half an ounce of cocaine from Richardson, but Richardson had only about half an ounce of cocaine at that time and wanted to keep some, so Redinger bought three-eighths of an ounce. An eighth of an ounce, also referred to an "eight ba1l," weighs approximately 3.5 grams. Redinger testified that he watched Richardson weigh the cocaine and that the weight of the items on the scale, which included both the cocaine and a baggie, was 11.2 grams. The district court overruled Richardson's objections on the basis of "accuracy of the scale" and foundation to Redinger's testimony about the weight shown on the scale. According to Redinger, Richardson had a digital scale that he used to weigh the cocaine and the reference to a "digi" on the recording was to the digital scale. Redinger used the term "fish scale" on the recording because the cocaine looked like fish scales pressed together. Redinger testified that he agreed to pay $825 for the cocaine, gave Richardson the $500 he had with him, and told Richardson he would get him the rest of the money after selling some of the cocaine.

After Redinger completed the purchase of cocaine from Richardson, he left Richardson's house and the investigators followed him to a location where Redinger handed over the cocaine.

Lyon placed the cocaine he received from Redinger in an evidence bag and sealed the bag. The investigators then took Redinger to the State Patrol office, where they searched him and his vehicle again and removed the wire transmitter. The investigators did not find any contraband on Redinger's person or in his vehicle. Lyon secured the cocaine in an evidence locker. He also downloaded the recording from the wire transmitter to a computer in the task force office. Finally, Redinger provided a written statement.

On January 8, 2010, Redinger and Lyon set up another meeting with Richardson so that Redinger could pay Richardson the rest of the money he owed for the cocaine. As with the previous controlled buy, investigators searched Redinger and his vehicle, gave him money for the buy, and placed a wireless transmitter on Redinger before a surveillance team followed him to Richardson's house.

The audio recording of the conversation recorded on January 8, 2010, also admitted by stipulation, shows that a male individual informed a second male individual that he had the money "for the rest of that coke." The second individual told the first that if he wanted more, he should come back that evening at 6:30 when the second individual could get him a half ounce as certain unnamed individuals from Iowa were bringing more after visiting their families in Omaha, Nebraska. The first individual offered the second one "325" and said he would give the second one a call. Redinger again testified that the audio recording accurately reflected events on the occasion when he paid Richardson the $325.

After Redinger left Richardson's house on this occasion, investigators again followed him back to a specified location where they searched Redinger's car. Investigators then drove Redinger to the State Patrol building, where they searched Redinger, who again made a written statement. Lyon retrieved the transmitter and downloaded the recording from January 8, 2010, onto the State Patrol computer.

Sarah Pillard, a chemist for the Nebraska State Patrol crime laboratory, tested the substance purchased from Richardson on December 17, 2009. Pillard testified that the substance in question tested positive for cocaine. The sample also contained a cutting agent, something that is sometimes added to a sample to increase volume, but which does not affect the test. Pillard also weighed the cocaine, using one of the crime laboratory's scales which are routinely used to weigh controlled substances. The scales are calibrated annually by the manufacturer, and then they are also checked once a week by one of the crime laboratory's chemists to ensure that the scales are working properly. If a scale was not working properly, which Pillard did not recall ever happening during the time she worked in the State Patrol crime laboratory, it would be taken out of service until it was repaired by the manufacturer. Pillard testified that she was not aware of any calibration issues with the scale used to weigh the cocaine in this case and that she followed the standard procedure for weighing a controlled substance. When Pillard was asked about the weight of the cocaine, Richardson objected on the basis of "lack of proper and sufficient foundation, foundation contains hearsay and confrontation." The district court overruled the objection, and Pillard testified that the net weight of the cocaine, excluding packaging, was 10.25 grams.

Lyon, who has participated in about 400 controlled purchases of cocaine, methamphetamine, and marijuana, testified that cocaine is typically sold by the gram. According to Lyon, a cocaine user typically purchases anywhere from a gram up to an "eight ball" for

personal use. Lyon testified that around January 2010, an "eight ball" of cocaine would have been worth about $225 to $350.

In addition to the above evidence, the State made an offer of proof during its case in chief to rebut the existence of entrapment, in the event that an entrapment instruction was requested by the defense. The State's offer of proof included a police report prepared by Lyon regarding a prior controlled purchase of cocaine from Richardson on December 10, 2009, a week before the controlled purchase in this case. The police report states that on December 10, a confidential informant purchased a gram of cocaine from Richardson for $100 and then Richardson asked if the confidential informant wanted to take an additional quarter ounce of cocaine and sell it for Richardson. The district court received the police report solely for the purpose of the offer of proof.

After presenting the evidence set forth above, the State rested, and Richardson moved for a directed verdict. The district court overruled Richardson's motion, and the defense rested without presenting any evidence.

During the jury instruction conference, Richardson requested that the jury be given a lesser-included offense instruction, which request the district court denied, relying on *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008), on the basis that the State offered uncontroverted evidence on an element necessary for the greater offense and the defense offered no evidence to dispute it. Richardson also requested an entrapment instruction. The court denied this request, relying on the State's offer of proof and *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984), on the basis that an informant's inquiry about buying drugs does not supply the degree of persuasion necessary for entrapment and that insufficient evidence had been presented to warrant such an instruction in this case.

The jury found Richardson guilty of distribution of a controlled substance and found the quantity of mixture contained in the controlled substance to be 10.25 grams. The district court accepted the jury's verdict, and after a presentence investigation and sentencing hearing, sentenced Richardson to imprisonment for a period of 3 to 6 years. Richardson subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Richardson asserts that the district court erred in (1) admitting evidence as to the weight of the cocaine over his objection, (2) refusing to give an entrapment jury instruction, and (3) refusing to give a lesser-included offense jury instruction.

STANDARD OF REVIEW

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable,

unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Alarcon-Chavez*, 284 Neb. 322, ___ N.W.2d ___ (2012).

ANALYSIS

Admission of Weight of Cocaine.

Richardson asserts that the district court erred in admitting evidence as to the weight of the cocaine over his objection. Although Richardson mentions both Redinger's and Pillard's testimony in this assigned error, his argument focuses on Pillard's testimony, since the jury's verdict corresponded with the weight to which Pillard testified. Therefore, we confine our analysis to the admissibility of Pillard's testimony.

Although Richardson objected to Pillard's testimony about the weight of the cocaine on several bases, some of which were less clear than might be desired, his argument on appeal revolves primarily around whether there was adequate foundation for the admission of Pillard's testimony. Pillard testified that she has analyzed controlled substances thousands of times and has testified in Nebraska as an expert more than 30 times. Pillard weighed the cocaine in this case using one of the crime laboratory's scales, which are routinely used to weigh controlled substances. The scales are calibrated annually by the manufacturer, and they are also checked once a week by one of the crime laboratory's chemists to ensure that the scales are working properly. Pillard was not aware of any calibration issues with the scale used to weigh the cocaine in this case, and she followed the standard procedure for weighing a controlled substance.

Richardson argues that foundation was lacking for Pillard's testimony because the State failed to prove that the scale she used in this case was accurate and working properly. He cites *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989), for the proposition that to sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly. In *Chambers*, a law enforcement aircraft was monitoring vehicle speeds on Interstate 80 and identified a vehicle that appeared to be speeding. The officer operating the aircraft used a battery-powered stopwatch to determine how long it took the vehicle to travel between two points, and the officer then used a conversion chart to determine that the vehicle was traveling at approximately 70 m.p.h. in a 55-m.p.h. zone. At trial, the State called as a witness a jeweler who testified that he had verified the accuracy of the officer's stopwatch using a particular type of testing device. The State also introduced the jeweler's certifications for the given stopwatch. The Nebraska Supreme Court reversed, finding that the State failed to prove the stopwatch was accurate. The *Chambers* court concluded that to present "'reasonable proof'" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches. 233 Neb. at 241, 444 N.W.2d at 671. We note that *Chambers* involved a speeding violation and that Neb. Rev. Stat. § 60-6,192(1) (Reissue 2010) contains specific

requirements for the verification of the accuracy of speed measurement devices in order to establish that they are working properly.

The State argues that a more applicable case is *State v. Smith*, 187 Neb. 152, 187 N.W.2d 753 (1971). In that case, the defendant was charged with possession of cannabis. At trial, a chemist employed by the State was allowed to testify, over the defendant's objection, that he had weighed the cannabis on a scale in the laboratory, and the chemist testified to its weight. The defendant argued on appeal that the foundation for the chemist's testimony was inadequate because it was not shown that the scale had been tested and found accurate. The Nebraska Supreme Court rejected this argument, noting that the defendant obtained leave to cross-examine for foundation and made no inquiry as to whether the scale had been tested for accuracy. The State asserts that the court in *Smith, supra*, essentially held that the accuracy of the scale was a matter of weight and credibility, not admissibility. In *State v. Infante*, 199 Neb. 601, 260 N.W.2d 323 (1977), the defendant objected that the scale on which the marijuana was weighed was not shown to have been accurate and was not certified for accuracy. In rejecting this argument, the Nebraska Supreme Court noted that the defendant did not cite any authority for the proposition that a certified scale was required. The court also noted the testimony that the investigator had checked the scale prior to weighing the marijuana and that it was in proper working order and accurate when tested against a known weight. The court concluded that the credibility of the testimony and the reliability of the scale were issues for the jury.

The State also points to the distinction between weight and admissibility of evidence in the context of driving under the influence cases, in response to challenges to the admissibility of breath test results. In that context, the Nebraska Supreme Court has held that any deficiencies in the techniques used to test the blood alcohol level in driving under the influence cases generally are of no foundational consequence, but only affect the weight and credibility of the testimony. See *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010).

We conclude that the district court did not abuse its discretion in finding that there was sufficient foundation for the admission of Pillard's testimony as to the weight of the cocaine. In reaching this conclusion, we note that Richardson did not cross-examine the chemist about the accuracy of the scale.

Richardson also notes in his brief on appeal that he "objected on Confrontation grounds." Brief for appellant at 14. He points to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and suggests that Pillard's testimony was improperly admitted because the State did not establish the accuracy of the scale through testimony of "a live witness subject to cross-examination" and there was not "even any type of certificate or affidavit to such calibration or accuracy." Brief for appellant at 14. *Melendez-Diaz* is inapplicable here. In that case, the defendant was on trial for distribution of cocaine and, instead of producing the analysts who tested the cocaine, the prosecution introduced certificates from the state laboratory analysts attesting that the substance seized by police tested positive for cocaine. The certificates also reported the weight of the cocaine. The U.S. Supreme Court held that this violated the Confrontation Clause of the Sixth Amendment, because the defendant was not allowed to confront the analysts. The Court did not hold that a defendant has the right to confront those involved in the maintenance and calibration of an instrument used to test and weigh a controlled substance. In a footnote, the *Melendez-Diaz* Court stated that "we do not hold, and it is not the

case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 557 U.S. at 2532 n.1. Richardson's reliance on *Melendez-Diaz* is misplaced. See, also, *State v. Britt*, 283 Neb. 600, 813 N.W.2d 434 (2012) (certificate containing chemical analysis certification of alcohol breath simulator solution used to test machine that was used to test defendant's breath was not testimonial and, therefore, not subject to confrontation clause).

We conclude that the district court did not err in admitting the testimony of the chemist regarding the weight of the cocaine. This assignment of error is without merit.

Entrapment Jury Instruction.

Richardson asserts that the district court erred in refusing to give an entrapment jury instruction.

Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for the commission of the criminal offense. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). The burden of going forward with evidence of government inducement is on the defendant. *Id*. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *Id*. The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden. *Id*. A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses. *Id*. Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, promise of reward, or pleas based on need, sympathy, or friendship. *Id*. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it. *Id*. Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive. *Id*.

In refusing to give an entrapment instruction in this case, the district court relied on *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984). In *Swenson*, a police officer drove a confidential informant to an arcade, where the confidential informant planned to locate a certain supplier and buy drugs. The informant did not find the supplier in the arcade, so the informant called the supplier and arranged for the supplier to deliver the drugs to the arcade. The informant and the officer waited in the officer's vehicle, and Swenson eventually approached the vehicle and asked if they were the party looking for the drugs. The officer responded affirmatively and then bought a bag of marijuana from Swenson, who was subsequently convicted of distributing a controlled substance. Swenson appealed, alleging the trial court erred by refusing to give an entrapment instruction. The Nebraska Supreme Court disagreed, concluding that the lone fact

that an undercover police officer, personally or through an informant, offers to purchase or obtain marijuana is not an inducement to commit a crime resulting in the availability of entrapment as a defense for the seller of the marijuana. *Id*. Inquiry alone is not a lure into criminal activity and does not supply the degree of persuasion necessary for entrapment. *Id*.

In this case, as in *Swenson*, the confidential informant merely inquired about buying drugs from Richardson. There is no meaningful distinction between this case and *Swenson*, and Richardson does not distinguish *Swenson*, other than suggesting that the amount of money offered to him by Redinger was so excessive that it amounted to inducement. Richardson notes that "[i]n connection with entrapment in drug prosecutions, other authorities have identified four principal 'inducements': appeals to friendship, sympathy, offers of excessive amounts of money, and appeals to the seller's 'addiction.'" *State v. Graham*, 259 Neb. 966, 975, 614 N.W.2d 266, 272 (2000). He argues that the $825 that he received for the cocaine was excessive because, when the cocaine was later tested, it was determined that the cocaine had been diluted with a cutting agent and that Richardson was actually getting more for the cocaine than it was worth. There is no evidence, however, that either Redinger or Richardson knew the cocaine had been diluted or by how much, so it cannot be said that Redinger induced Richardson or that Richardson was induced by the allegedly inflated price of the cocaine. We note that Pillard testified that the sample she tested appeared homogenous and that she could not see by looking at it that two different compounds had been mixed together. And, if Richardson was aware that the cocaine had been diluted, or if he himself diluted the cocaine, this alone refutes Richardson's claim of entrapment.

The record does not support a finding that the government induced Richardson to commit the offense. Further, the record is replete with evidence to show Richardson's predisposition to sell cocaine to Redinger. The district court did not err in refusing to give an entrapment instruction. Richardson's assignment of error is without merit.

Lesser-Included Offense Jury Instruction.

Richardson asserts that the district court erred in refusing to give a lesser-included offense jury instruction; specifically, refusing to instruct the jury on the lesser-included offense of possession of a controlled substance. Richardson's assertion is without merit because, as the district court explained, the State offered uncontroverted evidence on the charge for distribution of a controlled substance and Richardson offered no evidence to dispute the distribution element.

Possession of a controlled substance is a lesser-included offense of distribution of the controlled substance. See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011). To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case. *Id*. When the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the

lesser offense, the defendant must offer some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *State v. Draganescu*, *supra*.

In this case, Richardson presented no evidence to dispute the element of distribution. He argues that the trial court erred by not giving a lesser-included offense instruction in this case because Redinger had motive to plant evidence and fabricate a case against Richardson, which, according to Richardson, provided a rational basis for acquitting Richardson of the greater offense and finding him guilty of the lesser offense. We disagree. If Redinger fabricated a false case against Richardson, there would be grounds to acquit Richardson entirely, not to find him guilty of the lesser-included offense of possession of a controlled substance. To find Richardson guilty of the lesser offense, the jury would have had to find that Richardson possessed the cocaine but did not intend to distribute it. Richardson presented no evidence to this effect, nor does he argue that that was the case. The district court did not err in refusing to give a lesser-included offense instruction. Richardson's assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in admitting Pillard's testimony regarding the weight of the cocaine and did not err in refusing to give Richardson's requested jury instructions for entrapment and the lesser-included offense of possession. We affirm the conviction and sentence.

AFFIRMED.